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Sup. Ct. Brief

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Supreme Court of the United States

OCTOBER TERM, 1901.

Filed June 10, 1902

A. C. FINNEY as Receiver, &c., et al.,

Plaintiffs in Error,

v.

MARY A. GUY, &c.,

Defendant in Error.

Affidavit and Brief in Opposition to Application for Certiorari

Affidavit of John W. Bashford.
Brief in Opposition to Application.

R. M. BASHFORD,
Attorney and of Counsel for Defendant in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1901.

No. 443.

A. C. FINNEY, et al.,
Plaintiffs in Error,

vs.

MARY A. GUY,
Defendant in Error.

STATE OF WISCONSIN, } ss.
ST. CROIX COUNTY, }

John W. Bashford, being by me first duly sworn, deposes and says that he is the attorney for Mary A. Guy, the defendant in the above entitled action, that the argument in the case before the Hon. A. J. Vinje took place at Ellsworth, Pierce county, before said court on the 30th day of June, 1899, that what took place at said time is a matter of record; that under the rules and practice of said circuit courts of the state of Wisconsin the record in the case is the best and only evidence considered by the supreme court unless a bill of exceptions is duly made and settled as required by law. That within the time required by law the defendant duly appealed to the supreme court of the state of Wisconsin from the order of the Hon. A. J. Vinje, circuit judge,

all of which more fully appears in volume 106 of the Supreme Court Reports of the State of Wisconsin, page 256; that the supreme court of the state of Wisconsin as appears from the records of said case duly remanded the same to the lower courts for further proceeding according to law as affiant now remembers, reference being made to the original order for more particular certainty; that thereafter and within the time required by law the original record was duly transmitted by the clerk of the supreme court to the clerk of the circuit court for Pierce county; that thereafter and on the 7th day of May, 1900, the plaintiff duly applied to the circuit court of Pierce county for leave to serve an amended complaint. That the proposed amended complaint was the same as the original with this exception that the word "amended" was inserted after the word "their" in the first line of said complaint and that the following allegation as the 18th paragraph of said complaint was added: "That under and by virtue of the said constitutional provisions and laws of the state of Minnesota, defendant, by so organizing said corporation and by becoming a stockholder therein, agreed to assume and did assume liability for the debts of said bank to to the amount of double the par value of defendant's stock, and agreed to pay, for the benefit of the creditors of said bank, such sum as might be necessary to pay said debts, after the proceeds of the corporate assets had been so applied, not to exceed double the amount of the par value of such stock, and that under said constitution and laws there is due and owing the creditors of said bank, the plaintiffs herein, from the defendant Mary A. Guy, as such stockholder, the sum of $3,800.00 with in-

terest on same since April 28th, 1897, at the rate of seven per cent. per annum, to apply toward the payment of said judgment so recovered in favor of said creditors of said bank, plaintiffs herein, and that no part of the same has ever been paid; that for the courts of Wisconsin to refuse to enforce said judgment and decree is contrary to the constitution and laws of the United States, but more especially in this, that by the constitution and laws of the United States the said judgment and decree must be given the same force and effect in the state of Wisconsin that it has in the state of Minnesota, and that to refuse to enforcesaid judgment and decree against said defendant in the state of Wisconsin, is contrary to the constitution and laws of the United States in that it does not give full faith and credit in said state of Wisconsin to the public records and judicial proceedings of the state of Minnesota, and does not give to such records and judicial proceedings such faith and credit in the courts of Wisconsin as they have by law and usage in the courts of Minnesota." Which application was duly denied by the court and an order denying the same was duly entered on the 2nd day of June, 1900, a copy of which said order together with a notice of entry thereof is hereunto annexed and marked Exhibit "A."

That thereafter the plaintiff obtained from the court an order to show cause returnable on the 4th day of September, 1900, at the village of Ellsworth, Pierce county, why the plaintiff should not be granted leave to renew his motion to amend his complaint and why the order dated June 2nd, 1900, should not be vacated, a copy of said notice to show cause is hereto annexed and made a part of this affidavit and is marked Exhibit "B"; that

after a full hearing on said order the court denied the plaintiff's motion, that said order is still in force and has not been appealed from.

That thereafter the plaintiff noticed the original demurer for argument and on the hearing the plaintiff was represented by F. M. White and F. W. Reed who declined to argue said demurrer, whereopon the court made a motion dismissing the action, that the plaintiff thereafter appealed from the judgment entered dismissing the action.

Affiant further says that no bill of exceptions was settled in said action, that the clerk of the circuit court transmitted to the clerk of the supreme court of the state of Wisconsin such records and papers as the plaintiff desired, that the briefs of the attorney's in the circuit court are no part of the record, that no copy of any papers has ever been served upon the affiant except the printed copy of the case served herein.

JOHN W. BASHFORD.

Subscribed and sworn to before me this 8th day of January, 1902.

J. H. WALKER,
Notary Public, St. Croix County, Wisconsin.
[NOTARIAL SEAL] *My commission expires July 16th, 1905.*

EXHIBIT A.

CIRCUIT COURT, PIERCE COUNTY.

A. C. Finney, et al.,
Plaintiffs,
vs.
Mary A. Guy and Mary A Guy as executrix and sole residuary legatee under the will of Charles V. Guy, deceased,
Defendants.

To F. M. White and F. W. Reed, attorneys for plaintiffs.

Please take notice that an order was entered in the above entitled action in favor of the defendants and against the plaintiffs, of which the annexed is a true copy, in the office of the clerk of the circuit court, county of Pierce, on the 2d day of June, A. D. 1900.

JOHN W. BASHFORD,
Attorney for Defendants.

STATE OF WISCONSIN, CIRCUIT COURT FOR PIERCE COUNTY.

[Title of case.]

The plaintiffs above named having moved the court for leave to amend the complaint, a copy of which was attached to the notice of motion which was served on John W. Bashford, Esq., the attorney for the defendants herein, that the same should stand as the complaint in said cause coming on to be heard before Hon. E. W. Helms, at his chambers in the city of Hudson, St. Croix county, Wisconsin on the 7th day of May, 1900; F. M. White, Esq., and Fred. W. Reed, Esq., appearing for the plaintiffs, and John W. Bashford, Esq., appearing for the defendants. After hearing arguments of Fred W. Reed, Esq., in favor of said motion, and John W. Bashford, Esq., in opposition thereto.

Now Therefore, on motion of John W. Bashford, Esq., the attorney for the defendants herein, it is ordered that the plaintiffs' application to amend their complaint be and the same is hereby denied with ten dollars costs.

Dated Hudson, Wis., June 2, 1900.

E. W. HELMS,
Circuit Judge.

To the above and foregoing order the plaintiffs duly except.

Dated Hudson, Wis., June 2, 1900.

E. W. HELMS,
Circuit Judge.

EXHIBIT B.

State of Wisconsin. } In Circuit Court.
County of Pierce. }

A. C. Finney, et al.,
Plaintiffs,
vs.
Mary A. Guy,
Defendant.
} ORDER.

On the files and records in said cause, and on the annexed affidavit of Fred W. Reed, and on the stipulation extending the time for the defendants to answer herein, and on the annexed amended complaint and notice of application to amend thereto attached, and on motion of Fred W. Reed and F. M. White, attorneys for the plaintiff in the above entitled cause,

It is hereby ordered, that plaintiffs be granted leave to renew their motion to amend their complaint herein, and to have the annexed complaint stand as the amended complaint in said cause. And it is further

Ordered, that said defendant be and appear before

said court at a special term thereof to be held at the court house in the village of Ellsworth in said county of Pierce and state of Wisconsin, on the 4th day of September, A. D. 1900, at 2 o'clock P. M. of said day, or as soon thereafter as counsel can be heard, and show cause, if any she have, why the order heretofore made by the judge at chambers on June 2d, 1900, denying plaintiff's application to amend their complaint should not be vacated, and why the plaintiffs should not be allowed to amend their complaint, and why the amended complaint hereto attached should not be and stand as the complaint in said cause.

Let this order and said affidavit be served upon said defendant by leaving a copy thereof with John W. Bashford, Esq., attorney for said defendant, at least 10 days prior to the time of said hearing.

Dated August 10th, 1900.

E. W. HELMS,
Circuit Judge.

DEFENDANT'S BRIEF ON PLAINTIFF'S APPLICATION FOR CERTIORARI.

Plaintiffs in error upon filing in this court the writ of error from the Supreme Court of Wisconsin in the above entitled cause, immediately took steps to procure a further return, and the final result is the application for the writ of certiorari now under consideration. It has been the purpose of counsel for defendant after the transcript was printed to seasonably submit a motion to dismiss the writ or affirm the judgment, but it has been assumed that such motion would not be entertained pending proceedings to perfect the record. The only question now directly presented is whether plaintiffs' application should be granted, but the jurisdiction of this court must be considered as incident to the determination thereof.

I.

The record of the State Court.

This action was commenced in the circuit court for Pierce county, Wisconsin, March 28th, 1899. The complaint then served is now on file herein as part of the transcript. A demurrer thereto was interposed by the defendant upon the grounds: 1st, that the circuit court of Pierce county had no jurisdiction of the subject matter of said action; 2d, that the plaintiffs have not the legal capacity to sue; 3rd, that there is a defect in parties plaintiff in this, that it appears upon the face of the complaint that the plaintiffs, except A. C. Finney as re-

ceiver, have no interest in the subject matter of said action; 4th, that there is a defect in parties defendant in this, that Mary C. Guy, as executor and sole legatee under the will of Charles A. Guy, deceased, is not a necessary and proper party defendant; 5th, that several causes of action have been improperly united; 6th, that this action was not commenced within the time limited by law, etc.; 7th, that the complaint does not state facts sufficient to constitute a cause of action. The circuit court overruled the demurrer and the defendant appealed from the order. The supreme court reversed the order overruling the demurrer and the report of the case with the opinion of the court is found in 106 Wis. 256. The cause was remanded for further proceedings and plaintiff thereupon asked to amend their complaint setting up for the first time a Federal question in their pleadings which application was denied and no appeal was taken from this order. Thereupon the demurrer to the original complaint was sustained and judgment was entered dismissing the action. From this judgment an appeal was taken to the supreme court of Wisconsin. This judgment was affirmed by the supreme court and a writ of error was allowed by the Chief Justice to this court. There is no bill of exceptions on this appeal by the plaintiffs and none was necessary under the statutes, decisions and practice in the state of Wisconsin. Section 3050 Revised Statutes of Wisconsin provides that upon appeal from a judgment the clerk of the circuit court shall forthwith transmit to the supreme court the judgment roll, the notice of appeal and the undertaking thereon and annex his certificate. Section 2898 of the Revised Statutes of Wisconsin provides that

the judgment roll in such case shall consist of the summons and complaint, proof of service thereof, the pleading on the part of the defendant, a copy of the judgment and all orders and papers in any way involving the merits and necessarily affecting the judgment. Section 2873 of the Revised Statutes of Wisconsin provides that the bill of exceptions when settled and signed by the judge and filed with the clerk shall be a part of the judgment roll. Section 3070 of the Revised Statutes of Wisconsin provides that upon appeal from a judgment the supreme court may review any intermediate order which involves the merits and necessarily affects the judgment appearing upon the record whether the same was excepted to or not.

An appeal from a judgment dismissing a complaint brings up the order sustaining a demurrer upon which the judgment is founded. *Moritz v. Splitt*, 55 Wis. 441; *American, etc., Co. v. Gurnee*, 44 Wis. 49. It does not bring up for review interlocutory orders which do not involve the merits and necessarily affect the judgment unless excepted to and with the papers upon which they are founded embodied in a bill of exceptions. *Donkle v. Milem*, 88 Wis. 33, 37; *Keller v. Gilman*, 96 Wis. 445; *Midlothian I. M. Co. v. Dahlby*, 108 Wis. 195. Section 2870 of the Revised Statutes of Wisconsin makes provision for exceptions to orders when the trial is by the court. There written exceptions must be embraced in a bill of exceptions. Section 2872 of the Revised Statutes of Wisconsin provides for exceptions to orders which must be in writing and filed with the clerk within the time limited. This section provides that no exception will be necessary to review an order properly a part of the judgment roll in an action.

The trial court in settling a bill of exceptions is required to strike out all the evidence and other matters which should not be necessarily inserted therein. Revised Statutes of Wiscoesin 1898, page 2026, rule of circuit court, No. 24, section 1. Where there is no bill of exceptions the trial judge has nothing to do with the preparation of the record and has no control over the same. A motion addressed to the supreme court of the state in which the appeal is pending is the only method of correcting the record. *Hoff v. Olsen*, 101 Wis. 118, 123. The supreme court of the state will take no notice of papers and will give no consideration of matters not properly of record. *Watson v. Milwaukee*, 107 Wis. 328.

Without a return in compliance with the statute the appeal cannot be entertained by the supreme court. The record is treated as a nullity. *Sutton v. Railway*, 106 Wis. 225; *Gagen v. Janesville*, 108 Wis. 662. No bill of exceptions was necessary upon this appeal of the plaintiff from the judgment of the circuit court to the supreme court of the state of Wisconsin. *Iron River Railway v. Bayfield Co.*, 106 Wis. 587; *Dow v. Deissner*, 105 Wis. 385.

From the foregoing references to the statutes and decisions and rules and practice of the state of Wisconsin, it is clear that the plaintiffs have no right to have embraced in this return the papers referred to in the petition for writ of certiorari.

The rules of the supreme court of the state of Wisconsin quoted by the plaintiffs, do provide for assignments of error, and in pursuance thereof, four errors were assigned, the first three of which only were pertinent or material. The fourth so-called assignment of

writ of error, or in an assignment of errors after judgment in a state court is insufficient to give the supreme court jurisdiction; it must appear on the record that such title, right, privilege or immunity was specially set up and claimed at the proper time and in the proper way. *Leeper v. Texas*, 139 U. S. 462; *Chapin v. Fye*, 179 U. S. 127.

The matter decided by the supreme court of Wisconsin was one of state rule and practice, and if a Federal question was involved at all it was only incidental to a determination of the local question of what the state procedure required. *Miller's Executors v. Swan*, 150 U. S. 132, 137.

When the supreme court is of the opinion that the Federal question was erroneously decided, it will still affirm the judgment, if it appears upon another ground, even if such ground was not considered by the state court, the decision was correct. *Murdock v. Memphis*, 20 Wall. 590, 636.

Whenever a court of one state is required to ascertain what effect the public act of another state has in that other state the law must be proved as a fact and in order to be proved it must be properly set out in the pleading. *Lloyd v. Matthews*, 155 U. S. 222.

Great Western Telegraph Co. v. Purdy, 162 U. S. 329, was an action by a receiver appointed by the circuit court of Cook county, Illinois, to collect the unpaid subscriptions of stockholders, the amount of which was adjudged and fixed by the decree of the Illinois court. The suit was originally commenced by Purdy against the corporation, and the decree was entered upon a supplemental bill subsequently filed. The supreme

court of the state of Iowa held that the claim against Purdy was barred by the statute of limitations, and the case was brought to this court by writ of error and it was here held that the judgment of the supreme court of Iowa, construing the statute of limitations of that state and holding that the cause of action accrued against the defendant at the date of his contract of subscription and not at the date of the order of assessment, involved no Federal question and was not reviewable by this court. On page 338, the court say: "This action was not brought on a judgment for there had been no judgment." In other words this court held that the defendant, Purdy, was not bound by a decree in an action instituted by himself entered upon a supplemental bill filed without notice to him.

With respect to the question of unpaid subscriptions the rule is generally held that a judgment against the corporation is binding upon the stockholders; while, on the other hand, it is the exception to enforce any such rule as against the stockholders where the suit is brought to enforce the statutory liability. This question is considered by the supreme court of Wisconsin in the opinion already referred to, 106 Wis. 256, 273. On page 274 the court says: "The corporation is not made a defendant in the principal action as a representative of the stockholders in any sense. It is joined of necessity only where there are corporate assets which ought to be applied to the payment of the debts. Otherwise, it is a proper party, but only for the purpose of establishing against it as a finality the amount of the indebtedness for which the stockholders are liable. The primary right to be adjudicated in such action is the stock-

holders' liability. As an incident thereto, where there are corporate assets which should be applied to the payment of the indebtedness, the corporation must be brought in for the purpose of sequestrating and reaching such assets. If there are no such assets the corporation need not be made a party at all." The same rule has been announced in Minnesota *In re People's L. S. Ins. Co.*, 56 Minn. 180; *Minnesota B. Co. v. City Bank*, 66 Minn. 441.

It is misleading therefore for plaintiffs' counsel to state that there is a judgment in the Minnesota court against the defendant in error which the supreme court of Wisconsin has refused to recognize.

In the same opinion (p. 275) the supreme court of Wisconsin refers to the case of *Hanson v. Davison*, 73 Minn. 454, which is relied upon especially by plaintiffs in error. This decision was announced in 1898, and practically overruled former decisions. This was five years after this suit was instituted and after the rights of the parties had become fixed. In this connection it is said in the opinion of the Wisconsin court (p. 275):

"To give effect to the Minnesota statutes as now construed by its highest tribunal would be unjust to the defendant, because it would, in effect, make a liability enforceable here that was not enforceable when it accrued and that could not have been enforced under the law of Minnesota as it existed prior thereto during the time the defendant was a member of the corporation; it would subject defendant to substantially an independent action to enforce her liability, while, when it accrued, it was enforceable only in an action in equity at the domicile of the corporation, having sole jurisdiction of

the entire subject of stockholders' liabilities to the creditors of the corporation, and of all questions necessarily incident thereto; it would conclude her, as to questions vital to her liability, by a judgment rendered in an action to which she was not a party; whereas when she became a member of the corporation she did so in contemplation of a liability with certain incidents, she would be burdened with materially different incidents; whereas the plain purpose of the law is that all stockholders shall stand equally as regards rights and remedies, it would subject the defendant to a much more burdensome remedy, before her ultimate rights could be determined and enforced, than it does the resident stockholders; it would result in giving to resident stockholders their day in court and denying that valuable right to the defendant; it would give effect to a law which is contrary to the policy of the law of this state. For these and many other reasons that might be named, the law of Minnesota, as at present understood, should not be made effective here. Clearly the court cannot, consistent with the rules of comity, give effect to a doctrine which, if recognized, would lead to the oppressive results mentioned." On page 277, it is said further: "The doctrine of the Hanson case, 73 Minn., 454, is not sustained, in its main features, in the home court, upon any other theory than that the corporation in the original action stands for all the absent members, and that a judgment as to it, after it has ceased to exist for any practical purpose, concludes such absent members on questions in which the corporation has no interest and as to which it is not bound to protect their interests."

The judgment fixing the liability of stockholders in

the Minnesota court was entered April 28th, 1897, a year prior to the decision of *Hanson v. Davison.* The supreme court of Wisconsin in holding that the rights of the defendant were to be determined by the state of the law as construed by the highest court of Minnesota at the time contract was entered into and the liability became fixed is supported by repeated decisions of this court. The rights of the creditors and stockholders had been finally determined by that judgment under the statutes and decisions of the supreme court of Minnesota, then existing, and the obligation of the stockholders could not thereafter be enlarged by a subsequent decision in another cause by the supreme court of Minnesota construing this statute. The settled construction of a statute, so far as contract rights thereunder are acquired, is as much a part of the statute as the text itself, and a change of decision is the same in its effect on pre-existing contracts as a repeal or an amendment of a legislative enactment.

Douglas v. Pike County, 101 U. S. 677; *Rowan v. Rumels,* 5 How. 134; *Gepcke v. Dubuque,* 1 Wall. 175; *Chicago v. Sheldon,* 9 Wall. 50; *Olcott v. Supervisors,* 16 Wall. 678; *Chicago Life Ins. Co. v. Needles,* 113 U. S. 574; *Anderson v. Santa Anna,* 116 U. S. 356; *Bostwick v. Brinkerhoff,* 106 U. S. 3; *Johnson v. Kieth,* 117 U. S. 199; *German Bank v. Franklin Co.,* 128 U. S. 526, 539; *Knox Co. v. North National Bank,* 147 U. S. 91, 99; *Bacon v. Texas,* 163 U. S. 207, 221; *Wade v. Travis Co.,* 174 U. S. 499. 509; *Loeb v. Columbia Township Trustees,* 179 U. S. 472.

The question here involved is not one of local law to be settled by the decisions of the Minnesota court but is one of general law to be determined by reference to all

the authorities and a consideration of the principles underlying the contract relations between the parties. *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368.

As already stated one ground of demurrer on behalf of the defendant to the plaintiffs' complaint was that the action was barred by the statute of limitations.

An action on a contract express or implied or an action upon a liability created by statute is barred by the six years statute in Minnesota. General Statutes of Minn. 1894, sec. 5136. Wisconsin has a similar statute and it has been applied to an action to enforce the statutory liability of a stockholder in a corporation. *Sleeper v. Goodwin*, 67 Wis. 586.

The plaintiffs' complaint, which is part of the record, on file here, shows that about one-half the indebtedness of the bank accrued prior to March 28th, 1893, and all of it prior to June 15th, 1893, though as to part of the latter the exact date is not shown. This action was commenced March 28, 1899, and all claims accruing prior to March, 1893, were barred by the statute. This question was not considered by the supreme court of Wisconsin as it held the complaint insufficient upon other grounds which are stated in the opinion. It is stated in the complaint that the statutory liability of a stockholder in a Minnesota corporation is direct, primary and principal and not that of a surety. The right of action against a stockholder in favor of a creditor would accrue therefore at the time when the debt became due from the corporation. In a suit to enforce this liability it is incumbent upon the plaintiff to show that he belongs to the class of creditors who might assert a claim against the defendant. In an action against an in-

dorser upon a negotiable instrument it is incumbent upon the plaintiff to allege that proper notice of dishonor had been given in order to fix the liability of the defendant. *Continental Nat. Bank v. McGeoch*, 73 Wis. 332. In this case, therefore, it is incumbent upon the plaintiffs to show that they have a subsisting valid claim against the defendant growing out of the liability created by the statute of Minnesota. In such case the statute of Minnesota is not only a matter of defense,—it must be negatived in the complaint in order to show that the plaintiffs have a cause of action. It is an exception to the general rule to allow a creditor to sue before he has reduced his claim to judgment. *North Hudson Mutt. Bldg. & Loan Assn. v. Childs*, 86 Wis, 292. The complaint in an action to enforce a liability of this character is strictly construed and it is fatally defective if it fails to state the facts which lay the foundation for the plaintiffs' right to recover. *3 Thompson on Corporations*, §§ 4327, 4338; *Germania Iron M. Co. v. King*, 94 Wis. 439.

It further appears from the averments of the plaintiffs' complaint that the order of the court appointing the receiver clothed him with authority to compromise and settle claims against stockholders growing out of the statutory liabilities, "if he shall deem it advisable and to the best interests of the plaintiff and the creditors who have joined in this action" so to do. It is also alleged that the receiver has exercised this power in numerous instances and has released a number of stockholders residing in Minnesota and others residing in Wisconsin from their liability to contribute to the payment of the creditors, and it is sought in this suit to cut

off the right of the defendant from claiming contribution against such stockholders. This proceeding is of a much more flagrant character than that condemned in *Great Western Telegraph Co. v. Burnham*, 79 Wis., 47. There the circuit court for Cook county, Illinois, had levied an assessment upon the stockholders of the corporation for their unpaid subscriptions which was unequal in its character. The fund realized was not sufficient to pay all the debts. Some years afterwards, the court directed a second assessment to be made uniformly upon all the stockholders, without taking into consideration the inequality of the first assessment. A suit to enforce the second assessment against a stockholder in Wisconsin was commenced in the circuit court for Milwaukee county. The complaint contained a full statement of the facts, and it was demurred to, and the demurrer was sustained. It there affirmatively appeared upon the face of the complaint that some of the stockholders had paid forty per cent. of their subscriptions and some only two per cent.; and that the assessment sued upon was a horizontal assessment of thirty-five per cent. upon all. This was held to be conclusively unequal and unfair, and that the plaintiff had, by his own allegations impeached and discredited the decree of the court, notwithstanding the fact that the assessment was made by a court of competent jurisdiction. The decree of the Minnesota court is less worthy of credit, for instead of making the settlement, it delegated the power to a receiver to make such compromise as to him would seem advisable. The Illinois court had not sought to discharge or release the stockholders who had been so favored but they were still subject to suit for contribution by any

stockholder who might pay more than his share. Here the Minnesota court has discharged the stockholders with whom settlements have been made and debarred the defendant from enforcing any claim for contribution, in case she is required to pay the full amount of the liability. The court can indulge in no presumption in support of this complaint to the effect that if from the claims released by the plaintiffs are deducted those which have been barred as to defendant, the amount of the claims remaining will equal the amount of the liability of all the stockholders. The extent of the liability and the right of the plaintiffs to enforce it lies at the threshold of this suit; and if the complaint does not by proper averment set forth a valid subsisting claim against the defendant which she ought in equity to pay, ratably with the other stockholders, and the enforcement of which will not prejudice her rights, it fails to state a cause of action. If the procedure adopted will not enable the court to ascertain the amount of subsisting claims and to enforce payment upon equitable principles and preserve the rights of the defendant as against the other stockholders, then the remedy provided is inadequate and the complaint should be dismissed as a question of procedure alone.

The courts of Minnesota have enforced the statutory liability there created within their own jurisdiction, but they have not enforced a statutory liability created by the legislature of another state against citizens of their own state, or even the common law liability of the stockholder, resident in that state, of a foreign corporation.

First National Bank v. Gustin, etc., Mining Co., 42 Minn., 327, was a suit to enforce the common law liability of a

stockholder for unpaid subscriptions, and it was there held that the remedy is governed by the law of the forum and that the liability could not be enforced in that suit for reasons stated.

Rule v. Omega S. & G. Co., 64 Minn. 326, was a suit by a creditor of an insolvent foreign corporation to enforce a common law liability of a stockholder. It is there held that the remedy provided by the Minnesota statute is not applicable where it is sought to reach such unpaid subscription to the stock of a foreign corporation.

Hanson v. Davison, 73 Minn. 454, relied upon by plaintiffs' counsel and criticised in the opinion of the supreme court of Wisconsin was an action to enforce the statutory liability of a stockholder in a Minnesota corporation against a non-resident who had property in the state, and it was held that a separate action could not be maintained, as it was not proper or necessary, as the property could be sequestered in the original suit. With respect to that case it is to be observed that after the property of the defendant, situated in Minnesota, was attached, she appeared in the action. It was there held that while the liability was several the stockholders may, and upon equitable consideration ought to be joined in one action to enforce this several liability. The proceeding is therefore joint as to procedure. It is not a liability that can be enforced by one creditor against any single stockholder. However, it is said, an ancillary proceeding may be instituted to reach the property of a stockholder which has been discovered subsequent to the decree. This, of course, refers to property situated within the jurisdiction. The court say in the opinion that there is no difference in prin-

ciple between an action to enforce unpaid subscription and one to enforce a stockholder's liability, and that a judgment against the corporation is an individual judgment against the stockholders in their corporate capacity. This overlooks entirely the distinction with respect to the two liabilities recognized by all the courts including that of Minnesota in numerous decisions. The unpaid subscription is an obligation arising from contract and must be recovered in the right of the corporation. The statutory liability cannot be enforced by the corporation or through its right or by its assignee or receiver. It is an obligation of the stockholders to the creditors and must be enforced for the benefit of the latter in a proper proceeding instituted for that purpose. This is the nature of the liability in Wisconsin and in Minnesota. It is a limited, joint and several liability which attaches when the debt is contracted by the corporation. It is limited by the amount of the capital stock held by the stockholder. It is *several* in the sense that it is unequal and that there can be no judgment *in solido* against one shareholder, but joint in the sense that a solvent shareholder is liable up to the amount of his stock and beyond his ratable proportion to pay the share of an insolvent stockholder, for which he may have contribution against other solvent members; and it is joint in respect to procedure, as all stockholders must be enjoined in an action to enforce such liability brought by all the creditors or in their behalf. *Coleman v. White*, 14 Wis. 700; *Gager v. Marsden*, 101 Wis. 598; *Booth v. Dear*, 96 Wis. 516; *Terry v. Little*, 101 U. S. 216.

A statutory right coupled with a remedy to make it effective is enforceable only within the jurisdiction of

its creation and the statutory remedy is exclusive. *Pollard v. Bailey*, 20 Wall. 520; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Huntington v. Attril*, 146 U. S. 657.

The subject is fully discussed in *Pollard v. Bailey*, *supra*, and the decision there reached has been uniformly followed. Chief Justice Waite, speaking for the court, said: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purpose of its creation, and provide for the manner of its enforcement. Here the liability and the remedy were created by the same statute. This being so the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for a special remedy, that remedy, and that alone, must be employed." This and other decisions of like character are cited and followed by the supreme court of Wisconsin in the opinion in this action.

The liability created by the Minnesota statute providing a remedy for its enforcement is not at all of the same character as that created by the Kansas law which was under consideration in *Whitman v. Oxford National Bank*, 176 U. S., 559. The liability last referred to was in the nature of a guaranty of collection and the stockholder might be sued individually wherever found by any creditor of the corporation who had recovered judgment against the latter and had his execution returned unsatisfied. This distinction is recognized by this court in the decisions cited and in *Bell v. Farwell*, 176 Ill., 489;

Bank v. Ellis,132 Mass., 39, and in Thompson on Corporations, § 3055.

The liability created by the Minnesota statutes against the stockholder, resident in Wisconsin, cannot be enforced in the court of the latter state because the remedy is not applicable. The decision to that effect is not the denial of a Federal right but relates purely to the remedy which is governed by the law of the forum. The writ of error should be dismissed for want of jurisdiction.

Respectfully submitted,

R. M. BASHFORD,

Attorney and of Counsel for Defendant.